Supreme Court, U.S.
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No. 061061

IN THE

Supreme Court of the United States

CHEVRON USA, INC.; CRAWFORD & COMPANY,
Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; CHRISTOPHER HEAVIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether substantial evidence supports an administrative law judge's finding that an employer and its insurer did not satisfy the contribution requirement set forth in Section 8(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, and therefore are not entitled to limit their liability for payment of permanent total disability benefits to an employee to a period of 104 weeks?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The named appellants in the Court of Appeals and the Petitioners herein are Chevron USA, Inc. and Crawford & Company. The named appellees in the Court of Appeals and the Respondents herein are the Director, Office of Workers' Compensation Programs, The United States Department of Labor, and Christopher Heavin.

Chevron USA, Inc. is a subsidiary of Chevron USA Holdings, Inc., Texaco, Inc., Chevron Investments, Inc. and Chevron Corporation. Crawford & Company does not have any parent companies and no publicly held company owns 10% or more of Crawford & Company's stock.

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TEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on October 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

1. Longshore and Harbor Workers' Compensation Act - 33 U.S.C. Section 908(f)(1)

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of section 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods. In all other cases of total

permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods. In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

STATEMENT OF THE CASE

This matter arises from a claim filed by Christopher Heavin (hereinafter "Heavin") against Chevron USA, Inc. (hereinafter "Chevron" or "Petitioner") and Crawford & Company (hereinafter "Crawford" or "Petitioner") pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1333. On October 13, 1986, Heavin sustained multiple injuries to his body, including a bruised heart, multiple left rib fractures, contusion of the left lateral thoracic wall and upper abdomen, left hemothorax, ruptured spleen, laceration of the left kidney, fractured back, and fractured right femur when he fell approximately 40 feet from an offshore drilling platform.

On March 26, 1998, Petitioners filed a petition with the Office of Workers Compensation Programs, 18th Compensation District, seeking Section 8(f) Relief. Specifically, Petitioners sought to limit their liability for permanent disability benefits to 104 weeks, as Heavin had pre-existing impairments of his low back and kidneys. In support of their petition for Section 8(f) Relief, Petitioners relied on the medical reports of Dr. James T. London, board certified orthopedic surgeon, Dr. Paul Grodan, board certified internist, Dr. Nachman Brautbar, board-certified internist and nephrologist, as well as the medical reports and records of Lafayette General Hospital and Heavin's treating physicians.

Medical records from Lafayette General Hospital dated February 25, 1982 reflect that Heavin reported a five-year history of recurring back pain with radicular component into the right lower extremity. The symptoms were severe enough on February 25, 1982 that he was admitted to Lafayette General Hospital for a work-up. Heavin was

diagnosed as having a possible herniated nucleus proposus.

The records of Lafayette General Hospital also reflect that Heavin underwent a right pyeloplasty of the right kidney on March 4, 1982 and a right nephrectomy on March 8, 1983. As a result of the October 13, 1986 injury to his left kidney and the previous removal of his right kidney, Heavin now has only 25% of his kidney function remaining. Because Heavin only has part of one kidney, he cannot not be treated properly for his liver condition caused by hepatitis C. Similarly, Heavin cannot take over-the-counter drugs such as aspirin or Tylenol to control his back pain because said drugs will cause damage to his kidney over time. Heavin takes the prescription drug Darvocet for his back pain. Because Darvocet also damages the kidney, Heavin only takes the medication when his pain reaches a nine on a scale of one to ten, with ten being the most excruciating pain imaginable. In a medical report dated October 7, 1998, Dr. Grodan noted that Heavin's present kidney condition leaves him vulnerable to any nephrotoxic drugs or profound dehydration. Therefore, he must always be properly hydrated and avoid drugs such as nonsteroidal anti-inflammatories or anything that is potentially nephrotoxic.

In his reports dated August 24, 1998 and April 3, 2001, Dr. London opined that Heavin's low back and lower extremity pain constituted a pre-existing impairment. In his report dated August 24, 1998, Dr. London opined that the impairment which resulted from the October 13, 1986 injury combined with the impairment that was present in his lower back before October 13, 1986 to produce a greater total impairment than would have been present from the October 13, 1986 incident alone. In his August 24, 1998 report, Dr. London also found that Heavin's prior right nephrectomy produced a pre-existing wholeman impairment that made the impairment resulting from the October 13, 1986 injury

materially and substantially greater. A medical report from Dr. Grodan dated October 7, 1998 also indicated that because of his pre-existing right kidney problem, Heavin's medical condition and disability was substantially greater than it would have been from the October 13, 1986 injury alone. In addition, Dr. Brautbar opined that the absence of Heavin's right kidney played a role in contributing to his current impairment. Dr. Brautbar specifically noted that being hired with one kidney would have increased Heavin's risk for developing end stage renal failure and hemodialysis if he experienced blunt trauma to the abdomen.

The deposition of Dr. Grodan was taken on March 6, 2003. At that time, Dr. Grodan testified that a person who has lost one kidney will be considered impaired as he will only "have 50 percent of [his] original capacity." Dr. Grodan opined the removal of Heavin's right kidney in 1983 constituted a pre-existing permanent partial disability. Dr. Grodan further testified that a person with only one kidney must be more careful "about taking medication which can damage [the] kidneys because [that person does not] have as much reserve to fall back on." Dr. Grodan also testified that kidney infections may become a larger problem for someone with only one kidney.

On March 7, 2003, the deposition of Dr. London was taken. During the deposition, Dr. London testified that the removal of a right kidney would constitute a pre-existing permanent partial disability. Dr. London further testified that Heavin's current work restrictions arose from both the specific injury of October 13, 1986 and his pre-existing back disability. Dr. London also testified that pursuant to the American Medical Association*'s Guides to the Evaluation of Permanent Impairment*, 5th Edition, page 145, the removal of one kidney substantiates a 10% whole-man impairment.

On March 26, 1998, Petitioners filed a petition seeking Section 8(f) Relief with the Office of Workers' Compensation Programs, 18th Compensation District. At that time, Petitioners successfully established the first two requirements for an employer's entitlement to Section 8(f) relief. However, despite meeting the first and second elements, the District Director denied the Section 8(f) relief application, specifically finding that the third requirement of contribution was not met. An amended application for Section 8(f) relief was filed and served on April 23, 1999 to further establish the third requirement of contribution. The amended application for Section 8(f) relief was also denied by the District Director in a letter dated May 27, 1999.

On June 13, 2002, this matter was referred to the Office of Administrative Law Judges for formal hearing. The case proceeded to trial before the Honorable Jennifer Gee, Administrative Law Judge (hereinafter "ALJ"), from March 11-13, 2003 in San Diego, California. One of the issues at trial was Petitioners' entitlement to Section 8(f) Special Fund relief.

On December 11, 2003, the ALJ issued a Decision and Order Awarding Benefits to Heavin. The Decision and Order was filed and served on December 18, 2003. (See Appendix E.) In the Decision and Order, the ALJ held that Special Fund relief, pursuant to § 908(f) of the LHWCA, was not applicable and credit would not be taken by Petitioners. (*Id.*) The Decision and Order noted that Petitioners failed to prove the contribution element was met because Petitioners "presented less than persuasive medical records and testimony." The Decision and Order also indicated other possible causes for Heavin's pre-existing back pain and stated that Petitioners' medical experts applied the incorrect standard in determining the contribution requirement for Section 8(f) relief. (*Id.*)

On March 31, 2004, Petitioners filed a Further Petition for Reconsideration which addressed the issue of Section 908(f) Special Fund relief. The ALJ issued an Order Denying Request for Modification by Petitioners on May 7, 2004, which was filed and served on May 11, 2004. The ALJ held that the Further Petition for Reconsideration was untimely and, therefore, denied the request for reconsideration on the issue of Section 8(f) relief. (See Appendix D.)

Petitioners filed a Notice of Appeal with the Benefits Review Board (hereinafter "BRB")on May 19, 2004. The BRB issued a Decision and Order on April 26, 2005, affirming the Decision and Order Granting Permanent Total Disability Benefits, Order Granting Request for Modification of Decision, and Order Denying Request for Modification issued by the ALJ. (See Appendix B.) The BRB affirmed the ALJ's finding that Petitioners did not establish the contribution element. (*Id.*)

Based upon the final order of the BRB, Petitioners filed a Petition for Review with the U.S. Court of Appeals for the Ninth Circuit on June 22, 2005. The United States Court of Appeals for the Ninth Circuit subsequently transferred the Petition for Review to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued its opinion on October 26, 2006, affirming the decision of the BRB. (See Appendix A.)

ARGUMENT

Congress passed the LHWCA in 1927. (44 Stat. 1424, 1429 (1927).) From the outset, the LHWCA, through Section 8(f), was designed to promulgate a social policy of promoting the employment of workers with pre-existing permanent disabilities. Employers were encouraged to hire disabled workers in exchange for a reduction in liability for certain compensation. A witness to a congressional hearing in 1926 on the measure outlined the policy reason behind the LHWCA in the following manner:

> The second injury proposition is as much to the advantage of the employer and his interests as it is for the benefit of the employee. It protects the employer who has hired, say, a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of his being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also.

Hearings before Committee on the Judiciary, House of Representatives, S. 3170, 69th Cong., 1st Sess. (1926), p. 208; *see also Lawson v. Suwanee Fruit & Steamship Co*, 336 U.S. 198, 199 (1949).

Section 8(f) of the LHWCA was substantially amended by Congress in 1972. With the 1972 amendments, Congress reaffirmed the basic purpose of the Special Fund to protect

previously impaired workers. The Senate Committee on Labor and Public Welfare stated:

> Injury Following Previous Impairment
>
> The bill amends Section 8(f) of the Act in order to limit the burden on employers in so-called second injury cases. Many employers have an inaccurate impression regarding the liabilities for workmen's compensation when they employ handicapped workers. It is unfortunately a widespread belief that an employer is subject to burdensome compensation costs where a handicapped worker receives an injury at the new place of employment. The provision in the bill makes clearer that the employer's responsibility for the subsequent or second injury is limited to the scheduled award for the second injury or 104 weeks, whichever is greater. The remaining obligation to pay that employee where he is totally or partially disabled will fall upon the Special Fund existing under Section 44 of the Act. This method of spreading the risk among all employers is intended by the Committee to encourage the employment of handicapped workers.

S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 7 (1972).

In *C&P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977), the court reiterated that the purpose of Section 8(f), as amended in 1972, was to:

> [P]revent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for §8(f). The Act makes the employer

> liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers.

See also, Director, OWCP v. Cargill, Inc., 709 F.2d 616, 618 (9th Cir. 1983); *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 201 (1949); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982); *Todd Pacific Shipyards v. Director, OWCP*, 913 F.2d 1426 (9th Cir. 1990); and *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 426 (1990).

Under Section 8(f) of the LHWCA, as amended in 1984, an employer may limit its liability for payment of permanent disability compensation if three elements are present: (1) the injured worker had an existing permanent partial disability before the most recent injury; (2) the injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and (3) the present permanent total disability is not due solely to the most recent injury. 33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143 (9th Cir. 1991).

In recent years, the zealous defense of the Special Fund by the Director has resulted in the continuous tightening of the requirements needed to obtain Special Fund relief. Of the three requirements, the contribution element has become the most difficult to satisfy. In its opinion in this case, the Fifth Circuit stated: "Broadly referring to Congress's desire to reduce discrimination against the partially disabled is no substitute for actually meeting section 8(f)'s demands. Public policy does not entitle Petitioners to section 8(f) relief because Petitioners failed to meet the contribution requirement." The Fifth Circuit, like other courts, has increasingly viewed the Section 8(f) defense as an attempt by the employer to "dump" claims in the Special Fund. Unfortunately, the courts seem to have lost sight of the overall purpose of the Special Fund, which is to encourage the hiring of disabled workers.

Review by this Court is warranted because the decisions by the courts below are contrary to the intent of Congress when it enacted Section 8(f). Based upon the current trend of the courts, it cannot be said that Section 8(f) continues to achieve its purpose of encouraging the retention and hiring of disabled workers. If Section 8(f) fails to provide any relief to employers, the statutory motivation to hire disabled workers will be greatly decreased. In keeping with Congressional intent, courts should construe Section 8(f) liberally and generally in favor of employers.

Here, the evidence in the record clearly shows that Petitioners have satisfied the contribution requirement as set forth in Section 8(f)(1) of the LHWCA. The evidence shows that were it not for the removal of Heavin's right kidney in 1983, Heavin would currently have more than 25% of his kidney function remaining. With two kidneys, Heavin would have been able to tolerate additional pain medications without having his kidneys fail. If Heavin were able to take the

additional pain medication needed to control his back pain and the resulting incontinence, he would be able to return to a suitable alternative form of employment and therefore would presently have a permanent partial disability rather than a permanent total disability. Thus, the evidence of record successfully demonstrates that Heavin's present permanent total disability is not solely due to the October 13, 1986 injury.

A decision to disallow Section 8(f) relief in a situation such as this, where the employer hires a disabled employee in spite of his pre-existing disability, will create a disincentive for employers on the waterfront to hire persons with pre-existing disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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